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ARE MONOPOLIES ILLEGAL UNLESS ACCOMPANIED BY AN ABUSE OF THE POWER CONFERRED BY THE COMBINATION?

The Sherman Act, designed to prohibit combinations in restraint of trade, has, in the opinion of many lawyers, been construed to death in the recent so-called Steel Trust Decision. United States of America v. United States Steel Corporation (Opinion handed down March 1, 1920).

The defendant corporation in this case was the result of the merger of one hundred and eighty independent concerns. There was ample evidence to show that the company, at the time of its organization, controlled about ninety per cent of the steel business, and that the purpose of the organization was "to monopolize the steel trade." This finding was by Judges Wooley and Hunt in the District Court (223 Fed. 161). The District Court, however, found that the defendant did not, at the time suit was filed, control more than 49 per cent of the steel business and that it had abandoned its purpose to monopolize the trade and to fix prices, for which reasons the District Court concluded that defendant should not be dissolved nor in any respect held responsible for the sins of its organizers. The Supreme Court affirmed the decree dismissing the Government's bill by a vote of four to three, Justices Brandeis and McReynolds, not sitting and Justice Day with Justices Pitney and Clarke dissenting.

Probably the most important principle announced by the Court in this case as the basis of its decision is that the intent and even the actual accomplishment of the organizers of a so-called combination in restraint of trade to effect a monopoly have no bearing on the question whether the combination is in fact illegal at the time suit is instituted. The court declared that their consideration was not "of what the corporation had power to do or did, but what it has now power to do and is doing." Under this rule it would seem that any illegal combination using its power unlawfully to control prices and production could quickly suspend its illegal practices on the first sign of a storm of executive displeasure and continue to be "good" until the suit subsequently brought had been dismissed when it could promptly resume its illegal practices. It would simply be a case of the "devil was sick, the devil a saint would be." The Court admits that the illegal practices of the defendant continued as late as the year 1911, including attempts to control prices, which practices the Court declares were "abandoned nine months before this suit was brought." The Court further declared that there was not evidence "that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed nor is there any evidence of an intention to resume them." This last remark is due, no doubt, to the rule as to the "dangerous probability" of a resumption of illegal practices announced in the case of Swift & Co. v. United States, 196 U. S. 396.

Justice McKenna, who writes the opinion for the majority of the Court spends much effort at ridiculing the government's contention that the possession of the power of monopoly is itself illegal. He speaks of the "contradictions" involved in this theory and writes a school-boyish essay on elementary principles of logic which seem to have no purpose to serve except to divert the mind from the main point at issue. In the Standard Oil Case, 221 U. S. 77, the Court had distinguished, very properly, it seems to us, between acts done in violation of the statute and the condition brought about by the merger which "in and of itself is not only a continued attempt to monopolize but also a monopolization." In the present case Justice McKenna regards only the *acts done* in restraint of trade and not the *condition* produced by the merger as being illegal. But the merger itself,

"apart from works," created a monopoly which the Court was required to strike down. The learned Justice insists, however, that though the defendant is colossal in size and capable of exerting a tremendous influence in its particular field, yet such power was not now being exercised and had not been exercised, since the suit was filed, except for good. The opinion calls attention to the fact that customers and competitors made no complaint against the defendant; that prices were maintained at a certain level to which all competitors adhered; that the company did not seek to cut prices and that, so far from stifling competition, its competitors have actually thrived. Then Justice McKenna gets in at this point one of his plausible antithetical expressions intended to demolish the government's contention at one blow. After the referring to the success of defendant's competitors the Court says that "if this success was against the competition of defendant, we have an instance of movement against what the government insists was an irresistible force; if in consequence of it, we have an illustration of the adage that 'competition is the life of trade' and is not easily repressed. The power of monopoly in the corporation under either illustration is an untenable accusation."

The Court by thus requiring the government to prove *acts* of the defndant in restraint of trade as well as a "condition of monopoly" before it can demand a decree of recovery makes it practically impossible for the government to prevent the monopolies which are now increasing at a rapid rate. One of our correspondents informs us of an attempt at the present time to merge all the paint and varnish manufacturers in the country. We see no obstacle in the way of such mergers if the element of monopoly is no longer sufficient, in view of the Steel Trust Decision, to make a business combination illegal under the Sherman Act. Under this rule, any corporation, by a process of benevolent assimilation of other firms, may gradually obtain control of certain lines of business, and, if it does not seek to drive out all of its competitors from the market and does not seek to extort too great profits out of its monopoly, it is not an illegal combination. This rule is contrary to all the previous decisions of the Supreme Court and to the clear intent of the Sherman Act itself.

Justice McKenna is at great pains to prove the serious consequences to defendant's business and to the business of the country in general which would result from the dissolution of the defendant corporation. He calls attention, also, to the inevitable modern tendency to form larger units of business organization and to "integrate" various lines of business which are complementary to each other. Justice McKenna delights in the word "integration" and admits that the idea involved in that word is the basis and justification for the economic processes involved in so-called mergers. It is an advantage to a steel company to own and produce its own iron ore; to operate its own steamship lines for the purpose of tranporting its products; to own its own coal mines and coke ovens; to have separate mills to produce different kinds of merchantable iron products instead of producing different kinds in one mill. To thus "integrate" a business with its supplies and with its markets, huge capital and abundant resources are necessary. This argument is familiar to every student of economics. It may be true in principle and we are not gain-saying its truth. But, even if true, its conclusions run counter to the provisions of the Sherman Act which, however beneficial such mergers may be, prohibit all combinations which produce a monopoly. The Sherman Act may be a detriment to the business growth of the country from the standpoint of the economist, but, even so, it is not in the province of the Supreme Court virtually to repeal the act by implication. The people might prefer to restrict business in some particulars in order to secure what they regard as a greater benefit for themselves. If the people, speaking through their repre-

sentatives, are opposed to the creation of colossal business organizations *by process of the merger of competiting companies,* it is not for the Supreme Court to point out the inexpediency of such a policy and the injury it might do to our world trade, as Justice McKenna is so careful to do.

The dissenting opinion of Justice Day contains one paragraph which in the great clearness of its thought—a notable characteristic of Justice Day's opinions — thoroughly proves how far astray the majority of the Court has wandered in the present decision. Justice Day said:

"I agree that the Act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be practically to annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce."

Justice Day is sustained in his statement of the construction of the Sherman Act by the cases which during the last thirty years have construed this law. Pearsall v. Great Northern Ry. Co., 161 U. S. 646; Trans-Missouri Freight Assn. Case, 166 U. S. 290, 324; Northern Securities Case, 193 U. S. 197; Addyston Pipe Company v. United States, 175 U. S. 211, 238; Harriman v. Northern Securities Co., 197 U. S. 244, 291; Union Pacific Case, 226 U. S. 61, 88. While it was not the purpose of the Act to condemn contracts which in a lawful manner seek to expand one's own business and further legitimate trade, it did intend effectively to reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which from their nature, or effect, have proved effectual to restrain interstate commerce. Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Company, 221 U. S. 106; United States v. Reading Co., 226 U. S. 324; Straus v. American Publishers' Assn., 231 U. S. 222; Eastern States Lumber Association v. United States, 234 U. S. 600.

If the Steel Trust decision prevails the distinction between "good trusts" and "bad trusts," once the subject of ridicule and the butt of satirical jibes will have become established in the law by the solemn pronouncement of four judges of the Supreme Court. If the United States Steel Corporation is not a monopoly in restraint of trade, neither was the American Tobacco Company, nor the Standard Oil Company, nor Swift and Company, which recently, and, as it seems, to us, rather prematurely, in view of this decision, submitted to a decree of partial dissolution. If monopolies, irrespective of whether they are good or bad, are not prohibited by the Sherman Act, then let us quit talking about monopolies as being illegal but confine the inhibitions of the Sherman Act to such transactions which in themselves effect a restraint of trade. But in such event the dissolution of a combination into its constituent companies would hardly be the proper remedy unless the merger itself, by reason of effecting a monopoly, whether accompanied by acts in actual restraint of trade or not, is illegal.

NOTES OF IMPORTANT DECISIONS.

VALIDITY OF RESTRICTIONS IN RESTRAINT OF EMPLOYMENT UNNECESSARY TO PROTECT THE PROMISEE.—Attorneys sometimes overreach themselves by attempting too much. This is especially true in the case of stipulations in a contract in restraint of trade or employment; in such matters it is best not to demand too much. This caution finds ample justification in the plaintiff's complete defeat in the case of Stores v. Abrams, 108 Atl. Rep. 541. In this case plaintiff entered into a contract to employ defendant as manager of its store in Bridgeport, Conn., in consideration of which the latter agreed not to engage himself in the same line of business or "connect himself with any firm engaged in business similar to that of the party of the first part, for a period of five years." The Court held that this restriction against the right of employment was too severe and void as contrary to public policy. The Court said:

"Under the law, restrictive stipulations in agreements between employer and employe are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will.

"In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreements between employer and employe.

"In a restrictive covenant between a vendor of a business and the vendee, "a large scope for freedom of contract and a correspondingly large restraint of trade" is allowable. In a restrictive covenant between employer and employe on the other hand, there is "small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

The general policy of a strict construction of contracts in restraint of re-employment as against the former employer is well settled by authority. See Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Eureka Laundry Co. v. Long, 35 L. R. A. (N. S.) 119, note; Simms v. Burnette, 16 L. R. A. (N. S.) 389, note; Herbert Morris, Limited, v. Saxelby, (1916) 1 A. C. 688; Mason v. Provident C. & S. Co., (1913) A. C. 724; Nordenfeldt v. Maxim H. G. & A. Co., (1894) A. C. 565; Id., 11 Reports, 27; Konski v. Peet, (1915) 1 Ch. 530; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

On the question of the validity of the particular restrictions in this case the Court declared that it went far beyond what was necessary and that all plaintiff would be allowed to exact was an agreement providing that the defendant, while connected with a competing business, should not solicit trade from persons who were customers of the plaintiff at the store where defendant was formerly employed. This rule follows the English rule announced in Konski v. Peet (1915), 1 Ch. 530.

The present case, as we said in the beginning, should be a warning to attorneys not to exact too much from an employe on leaving a former employment. This warning is emphasized by the Supreme Court of Rhode Island in the case of Herreshoff v. Boutineau, 17 R. I. 7, 19 Atl. 469, 8 L. R. A. 469, where the Court said:

"Covenantees (in contracts in restraint of trade between employer and employe) desiring the maximum protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp too much, and so lose all."

A recent English decision (Hepworth v. Ryott, 89 L. J. Ch., p. 69) holds that the contract of a "movie" actor not to use his pseudonym, "Stewart Rome," in any capacity after the end of his employment was invalid as "extending beyond what was reasonably necessary for the employer's protection."

RIGHT TO USE EVIDENCE GAINED BY UNLAWFUL SEARCH AND SEIZURE.—Evidence secured by an unlawful search and seizure cannot be used nor required to be produced and this rule shall hereafter apply to corporations as well as to persons is the important rule announced by the United State Supreme Court in the recent case of Silverthorne Lumber Co. v. United States, 40 Sup. Ct. Rep. 182.

In this case after the two Silverthorne brothers had been arrested under an indictment charging a single specific offense, their place of business was searched without a warrant. The trial court ordered the papers returned, but permitted the district attorney to make copies and photographs. The Silverthorne brothers were ordered to bring the original books and documents before the grand jury. On their refusal to do so they were adjudged as being in contempt, the brothers sentenced to imprisonment and the corporation fined. On appeal the Supreme Court, by a vote of seven to two (the Chief Justice and Justice Pitney dissenting), reversed the judgment of contempt and held that evidence thus illegally secured could not only not be used by the Government but the defendant himself could not be required produce evidence, knowledge of which was

gained in such an unlawful manner. In reaching this decision the Court had to overrule the case of Linn v. United States, 25 Fed. 476. The Court said:

"The essense of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. The numerous decisions, like Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Td. 575, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in Weeks v. United States, 232 U. S. 383, 394, 395, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactority in Flagg v. United States, 233 Fed. 481, 483, 147 C. C. A. 367. In Linn v. United States, 251 Fed. 476, 480, 163 C. C. A. 470, it was thought that different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

WHAT IS A COMMON LAW MARRIAGE?

In this country, the general rule is that marriage is regarded as merely a civil contract, requiring no particular formality, which may be made by a private agreement between the parties, and which is capable of being proved by circumstances, as any other contract may be proved.

But whatever the case may be in England, yet it is clear that, with us, the marriage is complete, for every purpose, by the contract, without celebration. We have no Church, recognized by law, in the face of which the spousals might be celebrated. There is no Spiritual Court to compel parties to solemnize them or to inflict spiritual censure if they refuse.

Certainly, by our law, marriage is regarded only as a civil contract, and whatever is sufficient evidence of the assent of the parties' minds to enter into that relation, establishes a marriage. This may be either *per verba de praesenti*, "I take you for my wife," etc., or *per verba de futuro*, an agreement to marry in future, with subsequent cohabitation. Where parties agree to marry in future, and afterwards cohabit, the law infers that this cohabitation was an execution of the previous agreement. Like other contracts, it may be proved by circumstances, as by the parties living together, and speaking of or treating each other as husband and wife.[1]

In Tiffany's Persons and Domestic Relations[2] the author states the rule as follows:

"Certainly by the great weight of authority in this country, no formality in the celebration of a marriage is necessary, unless required by statute; but a marriage is perfectly valid at common law, whatever the form of celebration, and even if all ceremony was dispensed with. All that is necessary is that the parties shall consent to presently live together as husband and wife."

In Meister v. Moore[3] the United States Supreme Court held that a marriage valid at common law is valid, nothwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity. The Court said:

"This court adopts as an authoritative declaration of the law of Michigan, the ruling of the Supreme Court of that State in Hutchins v. Kimmell, 31 Mich. 126, that, notwithstanding the statutory regulations have not been complied with, a marriage contracted there *per verba de praesenti is* valid.

"That such a contract constitutes a marriage at common law there can be no doubt,

(1) Fryer v. Fryer and Stringfellow v. Scott, Richardson's Equity, 1831-1832, p. 109.
(2) P. 29.
(3) 96 U. S. 76.

in view of the adjudications made in this country, from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract."

The case of Hutchins v. Kimmell[4] was a case decided on the 13th of January, 1875. There, it is true, the direct question was, whether a marriage had been effected in a foreign country. But, in considering it, the Court found it necessary to declare what the law of the State was; and it was thus stated by Cooley, J.:

"Had the supposed marriage taken place in this State, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by the great weight of authority in favor of the rule as we have stated it."

C. J. RAMAGE.

Saluda, S. C.

TWO WORDS IN THE 18TH AMENDMENT WHICH MUST BE DEFINED — "CONCURRENT" AND "INTOXICATING."

We have been asked to reprint in full that part of the opinion of Judge Rellstab in the recent case of Feigenspan v. Bodine (recently decided by the District Court of New Jersey) which discusses the meaning of the two words in the Eighteenth Amendment about which there is so much dispute. Judge Rellstab's opinion is the first judicial attempt to construe these two terms and for that reason is interesting at this time. The following is the opinion complete:

Title II of the National Prohibition Act is alleged to be invalid.

First. Because the act lacks the concurrence of the State of New Jersey.

The allegation of the bill in this behalf is:

"Because the State of New Jersey has not concurred in the provisions of said act of Congress of October 28, 1919, Exhibit II, and said provisions, if enforced without its concurrence, would violate, override, and nullify the rights and powers vested in and reserved to the State of New Jersey in respect of its internal and intrastate affairs and concerns under the Constitution of the United States and the amendments thereto, and would deny to the plaintiff its constitutional right and liberty to carry on its business and manufacture and sell its non-intoxicating products as duly authorized by the laws of the State of New Jersey. (Par. XII, cl. 5.)"

This involves the interpretation of section 2 of the eighteenth amendment, and in particular the meaning of the word "concurrent" as used therein. The section reads as follows:

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by apropriate legislation."

This word is defined by the Century Dictionary as:

"1. Meeting in a point; passing through a common point.

"2. Concurring, or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident.

"3. Conjoined; joint; concomitant; coordinate, combined."

And by Funk & Wagnalls Standard Dictionary as:

"1. Occurring or acting together; as, concurrent signs, concurrent forces.

"2. Meeting or joining at the same point; running together; as, concurrent lines.

"3. United in action or application; coordinate; concomitant; as, concurrent rem-

(4) 31 Mich. 126.

edies or jurisdiction. Concurrent days, days added to make the civil correspond to the solar year.

Of these different definitions, the plaintiff has accepted, "Having the same authority; acting in conjunction" and "agreeing in the same act," and insists that these are the meanings intended by Congress in inserting "concurrent" into the second section of this amendment. Under such restricted meanings, Congress and the legislatures of the several States would have to agree upon every phase of the intended enforcing legislation, either as a whole in one act of legislation—practically impossible, or by separate acts of legislation applicable to the several States respectively. This would lead to irreconcilable differences rather than to practical enforcing legislation. To impute to Congress and the ratifying States such an impracticable purpose in the use of that word, is unthinkable, and such imputation is not to be accepted unless no other meaning of the word is permissible or it clearly appears that such restricted meaning was the only one in the mind of Congress when this section was framed. Of the other authorized definitions of the word, we have, as noted, "Contributing to the same act or effect; operating with; coincident." "Occurring or acting together; as, concurrent signs; concurrent forces." "Meeting or joining at the same point; running together; as, concurrent lines." "United in action or application * * * concurrent remedies or jurisdiction."

Congress framed the proposed amendment, and to it was open any of these meanings of the word, and it is not to be restricted to any one meaning that the spirit of advocacy of any particular construction may suggest. That meaning which will carry out the intended purpose of Congress should be given to this word. The thing sought to be prohibited is the manufacture of and commerce in intoxicating liquors for beverage purposes, and the prohibition extends throughout the United States and all territory subject to its jurisdiction. Only the enforcement of this prohibition is subject to the legislative power, and this power is delegated to both Congress and the several States. If Congressional action to be effective is dependent upon each of the States joining with it in its enforcement legislation, an absolute failure to effect such legislation is not merely possible but decidedly probable.

Based upon its selection of the more restricted meaning of "concurrent" the plaintiff contends that so far as concerns the manufacture, sale, and transportation of intoxicating liquors for beverage purposes within a State (intrastate business) no enforcement act of Congress affecting such business has any legal force or effect unless the State concurs therein. The practical effect of this limitation of the power of Congress is to confine its enforcement legislation to such manufacture as might be carried on in territories subject to the United States and to commerce with foreign nations (imports and exports) and among the several States (interstate). Such a limitation would deprive Congress of any effective control over by far the greater part of the business, the outlawry of which the amendment was intended to accomplish. It would give it no voice as to what should constitute intoxicating liquor when made the subject of intrastate business, and no regulation prescribed by it would have any effect on such business.

In such a division of power no uniformity as to what is intoxicating liquor or of regulations to prevent or detect violations could be reasonably expected. The differences in the percentages of alcohol allowed could be as numerous as the States, and the power of Congress would be practically confined to the prevention of smuggling the intoxicating liquor containing the greater quantity of alcohol from the States where it could lawfully be made and vended to those States where that of a lesser alcoholic content alone was lawful. When results of this kind are likely to flow from accepting the more limited definition of the word "concurrent" and the division of power built thereon, one naturally looks to the

more enlarged meaning as more likely to reflect the purpose of Congress in using that word. Turning to the amendment, it is not perceived that any division in the enforcing power, such as is contended for by the plaintiff, was contemplated. It makes no such division; it deals with the subject matter as an entirety; operates upon the whole of the United States and all territory subject to its jurisdiction; and the grant of power to enforce its prohibitions is as comprehensive as may be necessary or appropriate.

The amendment obliterates the distinction between interstate and intrastate commerce, so far as its subject matter is concerned. The prohibition of the first section of the amendment is self-executing to the extent that it outlaws the manufacture of and commerce in intoxicating liquors as a beverage throughout the entire Nation. It takes no note of State boundaries, whether the prohibited business is carried on exclusively within a State or extends beyond. The enforcing power granted by section 2 is intended to prevent a violation of the prohibition of section 1. This power so to enforce is granted to both Congress and the States. The word "concurrent" does not divide the power, but authorizes them both to exercise it by "appropriate legislation."

The failure of Congress to enact enforcing legislation would not affect the right of the States to do so. In such case if the State acted, its legislation would be operative only within the boundaries of the State. This, not because of any express limitation contained in the amendment, but solely for the reason that its jurisdiction extends no farther.

But when Congress acts to enforce this amendment, its command extends throughout the Union. This also is not due to any express authority found in the amendment, but because its enactments operate throughout the whole land. In thus legislating it acts independently of and without consulting the States. Whether the States concur therein is a matter for their sole determination. Failure on their part to co-operate with Congress casts the duty of enforcing the amendment within the boundaries of the nonconcurring States solely on the United States authorities. Again, if a State enacts legislation which in any particular is antagonistic to the law of Congress, such legislation must give way to the act of Congress. This supremacy of the acts of Congress results not from any express provision to that effect contained in the eighteenth amendment, but because of other provisions of the United States Constitution. In Article VI thereof it is declared that—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

By reason of this provision such a thing as a legal conflict between the laws of Congress, enacted pursuant to the powers granted or delegated to it, and the legislation of any of the States, is constitutionally impossible.

The United States and the several States have concurrent power over other subjects than the one dealt with by this amendment. In the exercise thereof by both the State legislature and Congress it has occasionally happened that conflicts in legislation resulted. However, the moment the antagonism occurs, the legal conflict is ended in favor of the acts of Congress, and an attempt to substitute the State legislation for that of Congress, is abortive. Such conflicts began quite early after the inauguration of our system of dual government. In *Gibbons* v. *Ogden* (22 U. S. (9 Wheat.) 1, 210), in a conflict engendered by the passage of an act by the New York Legislature granting exclusive navigation of all the waters within the jurisdiction of that State to certain persons, Mr. Chief Justice Marshall, speaking for the Supreme Court, said:

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded as well on the nature of the Government as on the words of the Constitution. In argument, however, it has been contended that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislature as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

The doctrine here announced has been consistently adhered to. Mr. Justice Harlan, in *Northern Securities Co.* v. *United States* (193 U. S., 197, 347), said that this was—

"Vital to the United States as well as to the States, that a State enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Government as from the words of the Constitution (pp. 347-348)."

If section 2 of the amendment had not been ordained, Congress would still have ample power to enforce the prohibition decreed by section 1 thereof by appropriate legislation enacted under Article I, section 8, last clause of the Constitution of the United States, which read as follows:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

But without section 2 of the eighteenth amendment, the States would have had no power to enforce the prohibition. This disability was removed by including the States with Congress in that section. However, the use of the word "concurrent" gave the States no power to engage in a legislative conflict with Congress. The States possess power granted by this amendment as they possess all other concurrent powers; dominant, when they alone exercise it; subordinate, when it is exercised by Congress.

The prohibitory section of the eighteenth amendment is of national scope and operation, and its efficacy depends upon its being nationally enforced. Its enforcement section was nationally envisaged, as was the need of the co-operation of the several States to secure general observance. To carry out such a concept Congress alone of all the legislative bodies must take the lead, and its leadership, when assumed, dominates.

The administrative machinery of the several States is well adapted for immediate

and efficient use, and the co-operation by the States with Congress would be of great value to the Federal authorities who, under the national prohibition act, are required initially to carry out its provisions. But, as noted, there is no constitutional constraint upon a State so to co-operate. It may choose so to do or not. If it fails to act at all, the enforcement of such statute within its borders falls exclusively upon the executive departments of the United States Government. If the State enacts legislation, whether under the eighteenth amendment or in pursuance of its police power, and it authorizes or permits the doing of anything already forbidden by the acts of Congress (as the State of New Jersey has done since the filing of this bill) such authorization or permission, for the reasons given, will be rendered unlawful *ab initio* by such contrary determination of Congress, and will afford no protection to any who may violate the congressional statute.

Second. Because its definition of intoxicating liquor is wholly without basis in fact, and therefore, arbitrary and oppressive and unconstitutional.

In section 1 of Title II of the national prohibition act Congress has defined what is intoxicating liquor, within the meaning of that act. The section, so far as it relates to such definition, is as follows:

"Sec. 1. When used in Title II and Title III of this act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided,* That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe."

The plaintiff not only assails the general definition which makes a liquor containing one-half of 1 per centum or more of alcohol by volume intoxicating, but also the more restricted definition which also makes beer, ale, or porter containing "less than one-half of 1 per centum of alcohol by volume" intoxicating, unless they are otherwise denominated than such beverages and are contained and sold in containers sealed and labeled in accordance with the regulations prescribed by the Commissioner of Internal Revenue. But the plaintiff's bill is not framed to question this additional and more restricted definition.

The bill alleges that the plaintiff has on hand large quantities of "nonintoxicating war beer," concededly containing more than one-half of 1 per cent of alcohol (Par. VII), and that for it to discontinue the manufacture and sale of that kind of beer to comply with the provisions of the "national prohibition act" would be destructive of its business and property (Par. XIV). The bill nowhere alleges that the plaintiff has on hand or intends to manufacture and sell beer, ale or porter containing less than one-half of 1 per cent of alcohol. On the contrary, it alleges that beer containing less than that percentage "cannot be successfully or profitably substituted by it in its business for the war beer it has heretofore manufactured and sold" (Par. XV).

In Paragraph V, devoted to stating the percentage of alcohol contained in the plaintiff's products since the passage of the act of Congress of August 10, 1917 (the Lever Act), there is a parenthetical statement that since October 28, 1919, plaintiff has manufactured and sold some malt liquors containing less than one-half of 1 per cent of alcohol by volume. But nowhere is there an allegation that plaintiff has any such liquor on hand which it desires to sell in containers labeled otherwise than the act provides, or that it desires to

resume the manufacture or sale of any such liquors.

The gravamen of the complaint is that the congressional definition that malt liquors containing one-half of 1 per cent of alcohol by volume which are fit for use for beverage purposes are intoxicating is illegal, and that the defendants intend to prevent plaintiff from manufacturing and selling liquor containing that percentage of alcohol and its so-called war beer, which have a greater alcoholic content, but not exceeding 3.4 per cent in volume. The judicial inquiry here is therefore limited to whether Congress has the power under the eighteenth amendment to determine that malt liquors containing but one-half of 1 per cent of alcohol and fit for beverage purposes are intoxicating.

Plaintiff does not contend that Congress may not enact a definition. It undoubtedly has the power, within limitations, to determine facts. (See *Jacobson* v. *Massachusetts*, 197 U. S., 11.) However, the determination must not be arbitrary.

Is the definition of intoxicating liquors as "containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes," without basis in fact and, therefore, arbitrary and void? It is the presence of alcohol that makes liquor intoxicating. Experts differ in their beliefs and opinions as to what quantity of alcohol will or will not produce intoxication. The effect of the same quantity on different persons varies, depending upon a number of conditions, and defying exact definition. A failure to define legislatively what was intoxicating liquor would of necessity refer that question to judicial decision. This would inevitably result in a serious lack of uniformity of decision as to what constituted intoxicating liquor. As persons are affected differently by liquor containing the same percentage of alcohol, and as in the absence of a fixed standard, the effect on the individual would most frequently control the decision, we would have conflicting decisions as to liquor drawn or poured from the same container at the same time. Such result would conduce neither to a proper enforcement of the prohibition amendment nor to a due respect for the administration of laws generally. Therefore, when Congress concluded, as it had a constitutional right to do, that a definition was necessary for a proper enforcement of the prohibition amendment, it, in determining what should be the standard, engaged in a work that necessarily involved discretion, the bounds of which were only that it should be reasonably exercised. If, in its exercise of such discretion, it determined that the proper enforcement of such prohibition required that a percentage be adopted that would certainly prevent intoxicating liquors being made and bartered, and the adopted basis or percentage has a reasonably appreciable relation to the subject matter of the prohibition, it cannot be judicially condemned as arbitrary. This seems to be the rationale of both the prevailing and dissenting opinions in *Ruppert* v. *Caffey et al.* (decided January 5, 1920.

In that case the definition of intoxicating liquor, for the purposes of Title I of this same enactment—national prohibition act—was under attack. The decision there reached is controlling here. Title I of the act had for its purpose the enforcement of war prohibition, and defined the words "beer, wine, or other intoxicating malt or vinous liquors" as contained in the war prohibition act "to mean any such beverages which contains one-half of 1 per cent or more of alcohol by volume." At the time of the passage of the national prohibition act the eighteenth amendment had not yet become a part of the Constitution, and it was lacking as an express authorization to enforce the definition contained in that title. However, the power of Congress to define what is intoxicating liquor for the purpose of enforcing the war prohibition act, as well as the particular definition there drawn into question, was upheld as within the war powers of Congress.

In the prevailing opinion Mr. Justice Brandeis, in support of such proposition said:

"If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the Nation's efficiency in men, munitions, and supplies is as full and complete as the police power of the States to effectively enforce such prohibition in order to promote the health, safety, and morals of the community, it is clear that this provision of the Volstead Act is valid and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all of the States establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. * * *

A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains one-half of 1 per cent of alcohol by volume.

* * * * * *

"The decision of the courts as well as the action of the legislatures make it clear —or, at least, furnish ground upon which Congress reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors."

This decision was by a bare majority, but the minority opinion based its dissent not upon the lack of power in Congress to give to the word "intoxicating" a legislative meaning which would be conclusive in litigation, but that as the eighteenth amendment had not become effective, Congress had "no general power to prohibit the manufacture and sale of liquors" and that there is no appreciably reasonable relationship between the challenged enactment and the war power which was the only constitutional power that could then be invoked for such definition.

The identical definition sustained in that case was employed by Congress in Title II of the same act, which contains the provisions for the enforcement of the constitutional prohibition then soon to go into effect. If, as held in the cited case, the war power of Congress is sufficient to sustain its definition of what is intoxicating liquor, where the purpose was the enforcement of legislation prohibiting the sale of intoxicating liquors for beverage purposes until the determination of the war—at most a temporary period—it follows beyond peradventure that Congress possesses the same power of definition in enacting legislation directed to the enforcement of the constitutional mandate prohibiting permanently the traffic in the same commodity. The definition is not arbitrary, but, on the contrary, has a rational basis for its support. Indeed, keeping in mind the purpose of Congress to enforce the prohibition amendment, it is very appropriate legislation.

NEGLIGENCE—LAST CLEAR CHANCE.

TULLOCK et al. v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut, Dec. 22, 1919.)

108 Atl. 556.

The essentials of last clear chance doctrine are that the injured party has come into a position of peril; that injuring party then or thereafter became, or by exercise of ordinary prudence ought to have become, aware, not only of that fact, but also that the party in peril either reasonably cannot escape from it, or apparently will not avail himself of opportunities for escape; that the injuring party subsequently has opportunity, by exercise of reasonable care, to avoid the injury, and fails to exercise such care.

This review has been called out by criticisms made by defendant's counsel directed at the inclusion within the terms of the statement of conditions of cases where the injuring person does not become aware in fact of the other's peril in time to save the latter by the exercise of reasonable care commensurate with the circumstances, but ought to have become aware of it had he acted as a reasonably prudent man should, and especially where also, as here, the negligence of the injured party in remaining oblivious to his exposure continued to the end. The chief criticism appears to be that by such inclusion the injuring person might be held

liable, although his fault consisted only of negligent inattention, and therefore partook of the same quality as that of the injured person.

There is no doubt that counsel can find support for their contention in the utterances of courts which have clung more tenaciously than have we to the notion which has had much vogue in many quarters that, where there has been concurring negligence, whatever the relation each party bore to the other and the negligence of each to the result as its contributing cause, there can be no recovery. We have recognized that inherent injustice might well result from a strict application of such an unyielding doctrine to all cases without observing distinctions based upon the quality of the several acts of causation arising from the superior position occupied by the actor, his greater opportunity and the more intimate relationship of his negligence to the event, and have intentionally adopted a rule alleviating somewhat the burden of suffering cast by the stricter rule upon persons injured under certain circumstances through the fault of others than themselves in part and more in accord with just and humane considerations. This rule calls for the exercise at one's peril of reasonable care in respect to both observation and action for the safety of others in positions of danger who, during the vitally important period in which emergency action might reasonably be expected and would be effectual, do not themselves make a further contribution of negligent action by materially changing the situation already created. Nehring v. Connecticut Co., 86 Conn. 109, 121, 84 Atl. 301, 524, 45 L. R. A. (N. S.) 902.

This rule distinctly recognizes that within the field of application of the last clear chance doctrine there well may be cases where negligence of inattention and obliviousness of surroundings on the part of the person injured continued even to the end. Thus, for example, the specific rules laid down in Fine v. Connecticut Co., 92 Conn., 622, 103 Atl. 901, distinctly comprehend cases where a person who has come into a position of peril fails to become aware of that fact as in the exercise of ordinary care he should, and therefore fails to take steps to escape from it. Nehring v. Connecticut Co., 86 Conn. 109, 120, 84 Atl. 301, 524, 45 L. R. A. (N. S.) 896, 902. In all such and similar cases they neither ignore the presence of that negligence nor disregard it as having been in some measure productive of the resulting injuries. They simply say that under certain circumstances, to-wit, those stated in the rules, that that negligence deserves to be relegated to the field of remote cause, and therefore not to be regarded in the proper legal sense as a proximate one. Nehring v. Connecticut Co., 86 Conn. 109, 116, 84 Atl. 301, 524, 45 L. R. A. (N. S.) 896, 902.

Defendant's counsel further urge in support of their appeal that the rule of the Nehring and subsequent cases, if it is to stand, should be limited to conditions where the duty to know is clear and obvious, or as otherwise stated where the opportunity to see and know is so clear that the person must have known had he used his senses. We fail to appreciate the basis of the distinction thus attempted to be made between the degrees of proof required, or rather in the practicability of its application to given cases. The jury must, of course, find that the means of knowledge were so open to the injuring person that he ought in the exercise of ordinary care to have known before he can be held accountable for nonaction. We are unable to discover what more can reasonbly be required, or what sound reason there is for requiring more.

Coming now to the application to the evidence certified to this court of the rules hereinbefore recited, we find that there is none from which it could reasonably have been found that the defendant's motorman either saw the plaintiffs' intestates or became aware of their or their companion's presence in a situation of danger until an instant of time before they were struck and when it was too late to avoid injuring them. If, therefore, the court's denial of the motions to set aside the plaintiff's verdicts rendered was not justified, it must have been that the evidence failed to furnish reasonable foundation for a finding by the jury that the defendant's representative, operating its car, ought, in the exercise of due care, to have become aware that emergency action on his part was necessary, if the safety of persons endangered by his proceeding on his way was to be secured, in season for him to have saved them by the exercise of reasonable care commensurate with the circumstances. Examining the evidence, we find ourselves unable to say that there was such failure in the evidence before the jury.

There is no error.,

The other Judges concurred.

NOTE—*Proximate Cause in Last Clear Chance Cases.*—The instant case is referred to in 90 C. L. J. 209 in discussion of recent case of Barrett v. Chicago, M. & St. P. Ry. Co., 175 N. W. (Iowa) 950, which case held an instruction erroneous, which failed to recognize in a last clear chance case, that a railroad engineer on an engine only was bound to avoid injuring one whom he saw, reasonably, in a position of danger, and was not bound to exercise ordinary care to see one who had put himself in a place of danger.

The Court said in that case: "It is not enough, that by the exercise of ordinary care, they must have seen. It must appear from the evidence that they in fact did see or know of their perilous position."

It is difficult, it seems, to us, to state a hard and fast rule on this subject. Each case and its circumstances ought to make it a jury question whether the peril, though arising out of the negligent act of an injured person, might in every case put him where there was no duty for another to look out for him.

The instant case shows that in the case of Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 89, which was referred to in the note in 86 C. L. J. 70 in annotation, to Aiken v. Metcalf (Vt.), 102 Atl. 330, it was said: "A motorman of a trolley car running in a highway, or a chauffeur driving an automobile, is under a duty to be watchful for the protection of others, which another man under other conditions would not owe to his fellows." This case was put among the cases where the negligent conduct of a deceased was considered the proximate cause. Two dissentients go into extended discussion with the view of showing that it is rather for the jury to say what is the proximate cause in every last clear chance case and the groupings the Court made were somewhat arbitrary, as making the issue one of pure law. This dissent says: "The authorities, as a rule, place the cases of peril about to be imminent with those that are imminent, making the issue to depend upon the knowledge of the injuring party that the person subsequently injured is about to put himself in peril from which he can be saved by the reasonable care of the injuring party."

In Gahagan v. Boston & M. R. Co., 70 N. H. 450, 50 Atl. 146, 55 L. R. A. 426, it was ruled that where the railroad's servant had the means of knowing he was about to put himself in a place of danger, he is to be regarded as in such place.

And so where defendant's engineer saw a team approaching a public crossing in time to avert danger to the driver he ought to use ordinary care to avoid injuring him. Wilson v. Illinois C. R. Co., 150 Iowa 33, 129 N. W. 340, 34 L. R. A. (N. S.) 687.

In Dantzler S. & D. D. Co. v. Henley, 119 Miss. 473, 81 So. 163, 4 A. L. R. 1487, the facts show an accident to a passenger in an automobile, whereby he was run over after stepping from the car before it had fully stopped. The judgment for the plaintiff against the owner of the automobile was reversed. The dissents went on the theory, as said by one of the dissenting judges, that "The majority of the Court say that the negligence of the deceased in getting off a moving car was the proximate cause of his death. In my opinion the proximate cause of his death was being dragged and crushed by the truck, which the appellant negligently failed to stop. * * * It was not the fall which killed the deceased. * * * At most, the deceased was guilty of contributory negligence. His fall contributed to the injury, but was not the immediate cause of his injury." The other dissenting judge said the driver was notified immediately, but he did not stop his brakes. He ran 15 feet when he could have been stopped in less than 10.

This last cited case shows, that the majority considered that so far as negligence was concerned the majority deemed the company had no duty in the premises beyond the time, when the conrtibutory negligence of deceased came into play.

And so it seems that it is hard, indeed, to propound a hard and fast rule, but in each case it is a question to be resolved by the jury. The true theory, we think, is that, if contributory negligence of the plaintiff sets in motion what results in injury, this is to be deemed the proximate cause, unless some duty of care should have obviated the consequences; then failure to take such care becomes the proximate cause.

C.

HUMOR OF THE LAW.

"I understand the alimony club has agreed on an economical plan of living."

"I suppose an alimony club has naturally to husband its means."

"Good morning, Mrs. Jagsby. We are peace delegates."

"Peace delegates?"

"Yassum. We were sent by Mr. Jagsby, who was unable to get home last night. He wants us to arrange the armistice terms and settle on the size of the indemnity he owes you."

"Umph! You tell Mr. Jagsby if he doesn't show up here in the next hour I'll come and get him. He's not in Holland."—*Birmingham Age-Herald.*

"It is queer that the lawyers cannot find some way to beat prohibition."

"Why so?"

"Because the principle is against all the interests of the bar."—*Baltimore American.*

"Do you suppose the suffragists will 'knife' any of our party leaders when they get the ballot?" asked the old-fashioned politician.

"'Knife,' sir?" replied Mr. Dubwaite. "I hardly think so, but I've heard several belligerent ladies say they had hatpins out for certain statesmen who oppose the ratification of the suffrage amendment." — *Birmingham Age-Herald.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy**—Executory Contract.—An executory contract by a corporation for the purchase of its own stock cannot be made the basis of a claim against its estate in bankruptcy, thus permitting the selling stockholder to share with creditors in its assets.—Keith v. Kilmer, U. S. C. C. A. 261 Fed. 733.

2.——Tracing Fund.—To entitle a depositor to recover the amount of checks deposited in an insolvent bank and uncollected on the date of its bankruptcy as a trust fund, he must identify and trace the proceeds into some fund or property which came into his hands of the trustee, and cannot so recover, where the checks had been deposited to the credit of bankrupt in other banks, which applied their proceeds on indebtedness of bankrupt to them.—In re Jarmulowsky, U. S. C. C. A. 261 Fed. 779.

3. **Banks and Banking**—Drawee Bank.—Under the Negotiable Instruments Law, a drawee bank is presumed to know the signature of the purported drawer of a check.—Minnehaha Nat. Bank of Sioux Falls v. Pence, S. D. 176 N. W. 37.

4. **Bills and Note**—Interest.—Where plaintiff bank executed its accommodation note for $5,000 and interest to defendant bank, which thereafter deducted the amount of the note and interest, $5,208.63, from the account of the plaintiff, plaintiff was entitled to recover of defendant the amount so deducted.—First State Bank of Lucca v. First Nat. Bank, N. D., 176 N. W. 4.

5. **Boundaries**—Survey.—In a suit to quiet title, evidence of a surveyor who had made a mere visual survey without actual measurements or determination of the exact course of a boundary stream, although professionally competent to make such survey, was merely nonexpert evidence and incompetent to prove the location and direction of the stream, or to contradict or impeach the official government survey.—Rue v. Oregon & W. R. Co., Wash., 186 Pac. 1074.

6. **Carriers of Goods**—Value of Goods.—A contract fairly entered into by a shipper and a carrier, declaring the value of goods accepted for shipment, is binding upon the shipper in an action for the loss of such property.—Noone v. Southern Express Co., Fla., 83 So. 607.

7. **Carriers of Passenger** — Ordinary Care.—Where defendant's employe, having transportation, was killed by one of defendant's interurban cars while crossing the track to board the same, the absence of statute or ordinance regulating the speed of defendant's cars while passing the station was immaterial, the operatives of the car owing the duty of using ordinary care to discover and avoid injuring persons who might be expected to be at the station.—Texas Electric Ry. v. Stewart, Texas, 217 S. W. 1081.

8.——Res Ipsa Loquitur.—First count of passenger's complaint against street railroad, alleging that he was sitting close to the rear of the car, using due care, when, through the negligence of the road, car ran off track and street and into stump of a tree, by reason of which passenger was thrown out of his seat, across the aisle, and against a seat on the other side, held demurrable as not specifying any act of negligence causing the car to leave the track.—Redding v. Wilmington & Philadelphia Traction Co., Del., 108 Atl. 739.

9. **Chattel Mortgages** — Constructive Notice.—After the due filing of a chattel mortgage, third parties are charged with notice of its contents to the same extent as if they had actual notice, and with notice of everything in instrument connected with description of mortgaged property which suggests inquiry as to identity of property intended to be mortgaged which, if pursued, would lead to an identification thereof.—First Nat. Bank v. Atchison, T. & S. F. Ry. Co., Okla., 186 Pac. 1086.

10.——Equity.—Where a judgment creditor sold a mortgaged chattel under execution and bought it in at a necessarily reduced price, it would be inequitable in an ordinary case for a court of equity to set aside the mortgage, for that would enable the judgment creditor to retain the property free from any lien having necessarily procured it at a reduced price.—Dey v. Moody, N. J., 108 Atl. 757.

11.——Inconsistent Election.—An effort to recover from a trustee in bankruptcy brick for which plaintiff held a bill of sale, in effect a chattel mortgage, executed by the bankrupt, was not an election inconsistent with his right to sue defendant for converting another part of the brick prior to the bankruptcy proceedings.—Ullman v. Austin, Wis., 176 N. W. 60.

12. **Compromise and Settlement**—Mistake.—Where, through mistake, certain stock certificates were issued to a contractor with the company entitled to be paid for his work in stock, there was no settlement between the parties.—

White Star Coal Co. v. Pursifull, Ky., 217 S. W. 1020.

13. **Contracts** — Mutuality. — An agreement founded on a consideration is not void for want of mutuality because one party has an option and the other none.—Foster v. Wright, Texas, 217 S. W. 1090.

14.——Offer and Acceptance.—The assent must be absolute and final, as one who makes an offer cannot be bound by a conditional acceptance.—Foster v. West Publishing Co., Okla., 186 Pac. 1083.

15.——Public Policy.—A contract between a business college and a pupil, requiring the pupil to board in homes approved by the college, is not contrary to public policy.—Castleberry v. Tyler Commercial College, Tex., 217 S. W. 1112.

16.——Substantial Performance.—A contract must be at least substantially performed according to the terms of agreement before a party can have any right of action thereon.—Enterprise Co. v. Neely, Tex., 217 S. W. 1088.

17. **Conversion**—Equity.—Where an executor is directed to sell land and divide the proceeds, the land is converted into personal property.—Cranstoun v. Westendorf, N. J., 108 Atl. 776.

18. **Corporations**—Estoppel.—Where property was sold to a corporation acting through its manager, was purchased for the use and benefit of the corporation, and the latter ratified the contract and the security mortgages by accepting and using the property, it is estopped to deny the validity of the security instruments, though they were executed prior to its legal organization as a corporation, and its successors are also bound by such ratification and estoppel.—Thorndale Mercantile Co. v. Continental Gin Co., Tex., 217 S. W. 1059.

19.——Foreign Corporation.—Unless defendant foreign corporation is doing business in the state, the temporary or permanent residence of its president in the state does not bring it within the state, so that service upon him will constitute service upon it.—Wollman v. Newark Star Pub. Co., N. Y., 179 N. Y. S 899.

20.——Personal Act of Officer.—Where the holder of an option on mining claims became director and officer of a company formed to operate such claims after exercise of the option, the company was not charged with knowledge of the officer's fraud on the owner of the claims; he having acted wholly for himself.—Keyworth v. Nevada Packard Mines Co., Nev., 186 Pac. 1110.

21.——Receiver.—Receiver should not bring action against directors and corporations to impound assets fraudulently obtained from corporation by the directors without authority from court by which he was appointed.—Cahall v. Lofland, Del., 108 Atl. 752.

22. **Covenants**—Restrictions.—A grantor's release of restrictive covenants does not preclude other parties, to whom he made deeds previously, or makes them subsequently, from enforcing their rights against any purchaser violating the restrictive covenants.—Muller v. Weiss, N. J., 108 Atl. 768.

23. **Criminal Law**—Instructions.—Instructions that are argumentative, rhetorical, and redundant are improper.—Gottlieb v. Commonwealth, Va., 101 S. E. 872.

24.——Principal.—One may be a principal who is not bodily present when the offense is committed.—Middleton v. State, Tex., 217 S. W. 1046.

25. **Death**—Interest in Tort.—Interest is not allowable in admiralty on a tort claim for death of a seaman prior to liquidation of the claim, although a number of other claims, similar, except for amount of damages, were liquidated at a prior date.—Union Steamboat Co. v. Fitzgibbons, U. S. C. C. A., 261 Fed. 768.

26.——Remarriage of Plaintiff.—In a wife's action for the death of her husband it was not error to charge that the jury should not consider in mitigation of damages the fact of her remarriage, inadmissible evidence as to such remarriage, introduced by defendant, having been admitted.—Texas Electric Ry. v. Stewart, Tex., 217 S. W. 1081.

27. **Divorce**—Alimony.—"Alimony" is an allowance in the nature of a partition of the husband's property of which the wife is entitled to a reasonable share for her maintenance.—West v. West, Va., 101 S. E. 876.

28.——Condonation.—Where husband resumed relations with his wife not knowing that she had been guilty of adultery, there was no condonation, though the parties had intercourse.—Van Wickle v. Van Wickle, N. J., 108 Atl. 761.

29.——Contempt.—Commitment of husband to jail for failure to pay alimony should not be ordered except where it appears that husband is contumacious, but where it so appears there should be no hesitancy in imposing such penalty.—West v. West, Va., 101 S. E. 876.

30.——Contempt.—Failure of plaintiff husband, suing for divorce, to pay alimony and counsel fees awarded defendant wife, is not a ground for striking out his complaint on the wife's motion, though possibly a sufficient basis to stay all the husband's proceedings in the action.—Naveja v. Naveja, N. Y., 179 N. Y. S. 881.

31. **Equity**—Bill of Review.—Bill of review is maintainable by a party to an original suit, or by some person holding under him or in privity to him.—Stuart v. Strickland, Ala., 83 So. 600.

32.——Parties and Privies.—Only parties or privies to original suit may bring petition in nature of bill of review.—Fillmore v. Morgan's Estate, Vt., 108 Atl. 841.

33. **Estoppel**—Equitable Estoppel.—The doctrine of equitable estoppel rests on the doctrine that, of two innocent parties, the one who has made a loss possible must bear it; it not being necessary that the party estopped intended to mislead the other, and it not being material whether his conduct was affirmative or negative, active or quiescent.—McConnell v. Hellwig, N. Y., 179 N. Y. State 882.

34.——Holding Out Agent.—Where the owner of a mining claim put another in position to hold himself out as holder of an option to sell, and purchasers dealt with such other on the assumption, the owner cannot urge the agency of such other and his misconduct as ground for setting aside his deed to the purchasers, since one who makes it possible for a person to perpetrate a wrong on another must suffer the consequences.—Keyworth v. Nevada Packard Mines Co., Nev., 186 Pac. 1110.

35. **Evidence**—Burden of Proof.—The phrase "burden of proof," in its true sense, means the risk of nonpersuasion upon the evidence in the case, but is also used to designate the duty to go forward and produce evidence.—Spilene v. Salmon Falls Mfg. Co., N. H., 108 Atl. 808.

36.——Contradictory Stipulation.—Oral evidence was admissible to contradict a stipulation upon which judgment was entered, where it was alleged that it was procured by fraud.—Purinton v. Purinton, S. D., 176 N. W. 31.

37.——Inference on Inference.—One inference of fact may not be based upon another inference of fact.—Sliwowski v. New York, N. H. & H. R. Co., Conn., 108 Atl. 805.

38. **Execution**—Inadequacy of Price.—Mere inadequacy of price was not sufficient to invalidate execution sale as against the judgment debtor's grantee, where the proceedings were fair and regular and there is nothing in the record to suggest fraud or concealment.—National Realty Sales Co. v. Ewing, Utah, 186 Pac. 1103.

39.——Redemption.—No creditor can redeem from an execution sale unless he has a lien on the property sought to be redeemed.—Beigler v. Chamberlin, Minn., 176 N. W. 49.

40. **Exemptions**—Insurance.—As applied to a pre-existing note of insured and his life policies, one having then no surrender value, and the other afterwards allowed to lapse, held that Act No. 189 of 1914, exempting proceeds of life insurance from liability for debt, if not secured by pledge of the policy, impaired only slightly and remotely the obligation of the pre-existing contract, and so did not violate the Constitution.—Succession of Clement, La., 83 So. 589.

41. **False Imprisonment**—Malice.—In an action for false imprisonment, malice need not be proven when recovery for actual damages only is prayed, but must be proven where punitive damages are sought.—Hill v. S. S. Kresge Co., Mo., 217 S. W. 997.

42. **Fraudulent Conveyances**—Presumption.—The presumption of fraudulent intent, which the statute creates in favor of creditors in case of a transfer of property to wife, may be overcome.—Flower City Brewing Co. v. Edwards, N. Y., 179 N. Y. State 887.

43. **Gaming**—Gambling Contract.—A valid contract of sale may be made for future deliveries of grain, even though seller has no grain on hand and will have to provide himself with the requisite quantity and quality before time of delivery; such contracts being illegal only where there is no intention to procure and deliver, or receive and pay for the grain; the contract under such circumstances being a mere wager.—Youtz v. McVean, Mo., 217 S. W. 1000.

44. **Gas**—Public Utility.—Where the property of a public utility, as a gas company, has increased so enormously in value since its acquisition as to render a rate permitting a reasonable return on such increased value unjust to the public, such a rate will not be fixed or permitted.—State Public Utilities Commission v. Springfield Gas & Electric Co., Ill., 125 N. E. 891.

45. **Homicide**—Good Reputation.—In a prosecution for assault to murder, the good reputation of the prosecutor was not admissible in evidence as an original proposition.—Jupe v. State, Tex., 217 S. W. 1041.

46. **Husband and Wife**—Statute of Limitations.—Where a husband abandoned his wife, leaving her in possession of the community lands, which possession she retained for 16 years, the wife could not acquire title to the lands by limitations.—Hardin v. Hardin, Tex., 217 S. W. 1108.

47. **Injunction**—Right of Employment.—The power to preserve the public peace and to arrest and prosecute persons for crime cannot be made to support action depriving persons of their constitutional right to employ others, or to enter into employment, and injunction will lie to restrain police and other officers, when thus acting beyond lawful power.—American Steel & Wire Co. of New Jersey v. Davis, U. S. D. C. 261 Fed. 800.

48. **Insurance**—Application for.—In a general sense the application may be regarded as an offer to contract and the certificate of membership as an acceptance of the offer.—Supreme Assembly of United Artisans v. Johnson, Wash., 186 Pac. 1065.

49.——Minimizing Damage.—Under a policy requiring insured in the event of a fire to protect the property from further damage and put it in the best possible order, the failure to do so did not prevent a recovery except for such of the property as could have been saved by the use of reasonable means at his command.—Messler v. Williamsburg City Fire Ins. Co., R. I., 108 Atl. 832.

50.——Reinstatement.—In view of Code 1907,§ 4579, where life policy gave insured the right to have policy reinstated after default in payment of premium, by performance of specified conditions, the effect of reinstatement after compliance with such conditions was to continue in force the original policy and not to create a new policy.—Mutual Life Ins. Co. of New York v. Lovejoy, Ala., 83 So. 591.

51. **Judgment**—Arrest of.—Failure to state a cause of action may be urged for first time on motion in arrest of judgment.—Swift v. Central Union Fire Ins. Co., Mo., 217 S. W. 1003.

52.——Collateral Attack.—The rule that a judgment by a court of competent jurisdiction will be set aside only for fraud which is extrinsic or collateral applies to strangers as well as parties to the action.—Filmore v. Morgan's Estate, Vt., 108 Atl. 841.

53.——Misdescription. — That defendants, in suit to set aside a fraudulent conveyance, did not call attention to the misdescription of the land in the complaint, which later entered into the decree, is not fraud, which, coupled with plaintiff's mistake, might constitute ground for equitable relief as to decree; they being under no duty to communicate the fact.—Stuart v. Strickland, Ala., 83 So. 600.

54.——Res Judicata.—Judgment of Court approving construction of ditch as public benefit and benefit to certain lands is res judicata as to those questions in subsequent attack on assessments to maintain ditch.—Book v. Trigg, Ky., 217 S. W. 1013.

55. **Landlord and Tenant**—Surrender.—Where lessor replied to lessee's offer to surrender the lease by oral negotiations concerning the agreed improvements and by letter stating a hope that the premises would soon be ready for lessee, lessee was justified in treating the reply as a rejection of the offer to surrender.—F. B. Norman Co. v. E. I. Du Pont de Nemours & Co., Del., 108 Atl. 743.

56. **Libel and Slander**—Privilege.—Manufacturing company's letter written by treasurer to customer relative to misappropriation of company's funds by its former representative, who it had cause to believe was misrepresenting continuance of his connection with it, in furtherance of his own business, held privileged within the law of libel.—Vaughan v. Lyton, Va., 101 S. E. 865.

57. **Master and Servant** — Fellow Servant.—Where plaintiff's fellow-workman operating drums controlling guy lines knew when he lowered a stone moved by a derrick that plaintiff was standing in a dangerous place, apparently unaware that it was so, when he directed his fellow workman to act, the Court properly instructed that jury might find for plaintiff on last clear chance theory.—Olson v. Fox, N. H., 108 Atl. 811.

58.——Notification of Injury.—The employers, one of whom saw the injured employe a few minutes after the accident, having known practically from the time of the accident the extent and circumstances of the injury, absence of notification in the manner provided by the statute will not prevent recovery.—Smith v. White, La., 83 So. 584.

59.——Respondeat Superior.—The owner of an automobile kept and used for the business and pleasure of the family is liable for its negligent operation by his wife, when driven for such purposes with his knowledge and consent.—Ulman v. Lindeman, N. D., 176 N. W. 25.

60. **Mortgages**—Equal Equities.—In the case of the conveyance by the mortgagor of all the mortgaged property to different purchasers at the same time, their equities must be regarded as equal, and each must contribute ratably to the discharge of the common burden. —Fullerton Savings Bank v. Des Granges, Cal., 186 Pac. 1052.

61.——Foreclosure.—The statutory right to redeem from a real estate mortgage foreclosure does not exist unless the property has been delivered to the foreclosure purchaser.—Whiteman v. Taber, Ala., 83 So. 595.

62.——Suspension of Alienation.—Where executors and trustees, under a power that was void, by reason of unlawful suspension of the power of alienation, mortgaged property, a judgment forclosing the mortgage, in an action wherein the executors, trustees, and heirs were all made parties defendant, and did not answer, stopped the heirs from afterwards setting up their interest against purchasers at the foreclosure sale.—Field v. Chronik, N. Y., 179 N. Y. State 891.

63.—**Municipal Corporation** — Taxation.—The power to tax enjoyed by municipality only by virtue of express grant from state does not include the power to exempt and classify.—Jones v. Broening, Md., 108 Atl. 785.

64. **Parties**—Intervention.—Judgment creditor which had garnisheed debtor's funds in a bank was entitled to intervene in action against debtor where plaintiffs therein had also by garnishment action impounded the money in possession of the bank, preventing bank from payment of money to judgment creditor; judgment creditor having "an interest in the subject-matter of the controversy" requiring that it be made a party to the action for the "due protection" of its rights, under St. 1917, § 2610.—Scheuer v. Regal Oil-Gas Burner Co., Wis., 176 N. W. 75.

65. **Perjury**—Instruction. — Where defendant gave money to a witness in a criminal prosecution to influence him to make a statement which he dictated, though he had no personal knowledge of the facts, and knew that the witness had full knowledge and had testified to them

before the grand jury, an instruction that his honest belief that he was influencing the witness to give a truthful statement would not be a defense was called for by the evidence.—State v. Liss, Minn., 176 N. W. 51.

66. **Physicians and Surgeons**—Care.—Where a physician exercises that degree of care, diligence, judgment, and skill which others in good standing of same school of medicine usually exercise in same or similar localities under like or similar circumstances, having due regard to the advanced state of science at such time, failure to diagnose correctly does not render him liable.—Jaeger v. Statton, Wis., 176 N. W. 61.

67.——Consent to Operation.—In an action against a surgeon employed to operate for appendicities for the removal of Fallopian tubes without plaintiff's consent, the burden was on plaintiff to prove that she did not expressly or impliedly consent to their removal.—Wells v. Van Nort, Ohio, 125 N. E. 910.

68.——License.—A license to practice medicine is a privilege or franchise granted by the government.—Harris v. Thomas, Tex., 217 S. W. 1068.

69. **Principal and Agent.** — Ratification. — Where a principal is known, but not named in the agreement, he cannot thereafter be held unless he ratifies the contract.—Tryon v. Clinch, Cal., 186 Pac. 1042.

70. **Railroads**—Trespasser. — Right of mere trespasser on railroad to recover for injury by train must be bottomed on the company's failure, after discovering him, to exercise care to avoid injuring him; no duty of lookout being owed him.—Gunter's Adm'r v. Southern Ry. Co., Va., 101 S. E. 885.

71. **Removal of Causes**—Jurisdiction.—To authorize removal of a cause into a particular District Court on the ground of diversity of citizenship, the cause must not only be one over which a United States District Court is given original jurisdiction in invitum, but unless plaintiff has expressly or impliedly consented to the removal, it must be one over which the selected court could have taken original jurisdiction.—Isaac Kubie Co. v. Lehigh Valley R. Co., U. S. D. C., 261 Fed. 806.

72.——Jurisdiction.—A suit in a state court for removal of an administrator held not removable, for want of jurisdiction of the federal court over the subject-mater.—White v. Keown, U. S. D. C., 261 Fed 814.

73. **Sales**—Breach.—Where, before the time named in a contract for the delivery of manufactured articles, the manufacturing company breached the contract and notified the buyer that it would not perform it, the buyer, relying upon the breach for the recovery of damages, was not required to allege and prove ability and readiness to perform.—Citizens' Bank v. Willing, Wash., 186 Pac. 1072.

74.——**Delivery.** — Where a contract for the sale of goods provides for their delivery at a designated point f. o. b., and where the title from the seller to the buyer passes, other terms of the contract having been complied with, the place so designated is the point of delivery, as place so designated is the point of delivery, as respects damages for buyer's refusal to accept.—R. W. Rounsayall & Co. v. H. Herstein Seed Co., N. M., 186 Pac. 1078.

75.——Lost Profits.—Where the seller of logs failed to deliver as fast as agreed, and the market price declined before all were delivered, but after they should have been delivered, the buyer was entitled to recover the profits lost by reason of such decline.—Usrey Lumber Co. v. Huie-Hodge Lumber Co., La., 83 So. 578.

76.——Option.—Contract, giving one party the privilege of buying grain to be delivered at a future date in return for valuable consideration paid to other party, is not a contract of sale, but an option; an option meaning a privilege.—Yontz v. McVean, Mo., 217 S. W. 1000.

77.——Rescision.—One who depends on the equitable right to rescind a contract of sale for the buyer's fraud has the burden to prove that a subsequent purchaser, resisting the action, took the property with notice of the fraud.—Cox v. Collom, Tex., 217 S. W. 102.

78. **Specific Performance** — Evidence. — The mere fact that lessor has agreed to sell demised premises does not bar lessee's right to specific performance of the lease, since the sale may have ben made subject to the lease, or the purchaser may have had notice thereof.—F. B. Norman Co. v. E. I. Du Pont de Nemours & Co., Del., 108 Atl. 743.

79.——Misrepresentation.—The seller of land to a buyer who intended to erect an apartment house is not entitled to specific performance where he misrepresented the dimensions of the lots and also the cost of excavating the rock on the property.—Muller v. Weiss, N. J., 108 Atl. 768.

80.——Rescission.—Vendee in a contract of sale of land having repudiated the transaction and attempted to rescind the contract, it was no longer necessary for the vendor, before bringing a suit for specific performance, to tender the vendee a deed or a certificate of title provided for in the contract.—Teague Inv. Co. v. Setchel, Cal., 186 Pac. 1046.

81. **Trade Marks and Trade Names**—Unfair Trade.—It is unfair trade, for which injunction will issue, for competitors to dress their taxicabs so that by the ordinary patron they are not distinguished from those of the yellow taxicabs of complainant, which had earned a patronage and good will under a peculiar and distinctive dress of its cabs, the predominant feature being the conspicuous yellow body; defendants being barred by their intentional fraud of the plea of common property in color.—Taxi & Yellow Taxi Operating Co. v. Martin, N. J., 108 Atl. 763.

82. **Vendor and Purchaser** — Interest.—The purchaser of land involved in partition suit under contract composed of his proposal and the approving decree of the court, both silent as to the subject of interest on the purchase price and time for taking possession, is liable for interest on the unpaid purchase money from the date on which he took possession, prior to the time fixed by the contract for setlement.—Bowman v. Newton, Va., 101 S. E. 882.

83.——Notice to Purchaser. — Purchasers of premises in the possession of a lessee having knowledge of the lease are chargeable with notice of an option of purchase therein.—McClung Drug Co. v. City Realty & Investment Co., N. J., 108 Atl. 767.

84. **Waters and Water Courses**—Nonuser of Right.—One to whom a right was conveyed to take water from a spring could not lose such right by mere nonuser; intent to abandon not being inferred from a nonuser alone.—Clement v. Rutland Country Club, Vt., 108 Atl. 843.

85. **Wills—Contest.**—In proceedings to contest a will where the issue is fraud, much latitude in the admission of evidence is allowed to the discretion of the trial judge, and his rulings will be reversed only for abuse of his discretion.—Awtrey v. Wood, S. C., 101 S. E. 920.

86.——Mistake.—A mistake in a will as to the land covered by a devise may be corrected at suit of the devisee after testator's death, though the transfer by the will is voluntary.—O'Conner v. McCabe, S. D., 176 N. W. 43.

87.——Power of Disposition. — A qualified power of disposition, such as a power to use or dispose of property for the support of the beneficiary, does not create a fee simple, whether annexed to a life estate expressly given, or to a general devise not specifying the quality of the estate.—Shaw v. Hughes, Del., 108 Atl. 747.

88.——Remainder.—A testamentary gift in remainder, expressed in terms to pay and distribute only, is generally contingent, and does not vest until the time for distribution arrives, but the rule does not apply when the gift in remainder is postponed for the conveniences of the estate, in which case the gift vests at the death of testator.—Cranstoun v. Westendorf, N. J., 108 Atl. 776.

89. **Witnesses**—Impeachment.—While a witness cannot be impeached by questions regarding his personal conduct not relevant to the case on trial, but only by evidence of his bad general reputation for truth and veracity, he must answer relevant or material questions, however much they disgrace or discredit his character.—Hunt v. Commonwealth, Va., 101 E. E. 896.

90.——Self Crimination.—The defendant, even in an incest case, who takes the witness stand, is entitled to be protected in his constitutional right to not be compelled to give evidence against himself.—State v. Morgan, S. D., 176 N. W. 35.